INDEX

Subject Index

	Page
Petition for Writ of Certiorari	1
Summary Statement of the Matter Involved	1
Questions Presented	5
Jurisdiction	5
Reasons Relied on for Allowance of the Writ	5
Conclusion	8
Prayer for Writ	8
Brief in Support of Petition for Writ of Certiorari	9
Prior Opinions of Courts	9
Grounds for Jurisdiction	10
Statement of the Case	10
Specifications of Error	10
Argument	13
Point A	14
Point B	18
Point C	27
Conclusion	27

Page

Aetna Life Ins. Co. v. Dunken, 266 U. S. 399 27

Alexander v. Missouri State Life Ins. Co., 68 Fed. (2d) 1 ..... 7, 17

American Nat. Ins. Co. v. Coates, 246 S. W. 356 ..... 12, 22

American Nat. Ins. Co. v. Smith, 13 S. W. (2d) 720 19

Automobile Mortgage Co. v. Ayub, 266 S. W. 134 24

Brammer v. Wilder, 57 S. W. (2d) 571 ..... 6, 10, 15

Cheeves v. Anders, 87 Tex. 287, 28 S. W. 274 ..... 6, 14, 15

Cheney v. Coffey, 113 S. W. (2d) 162 ..... 12, 22

Chicago, R. I. & P. Ry. Co. v. Thompson, 100 Tex. 185, 97 S. W. 459 20

Dug[illegible]n v. Lewis, 14 S. W. 1024, 79 Tex. 246 25

Erie Railroad Co. v. Tompkins, 304 U. S. 64 ..... 5, 16

Fidelity Mutual Life Assn. v. Harris, 94 Tex. 25, 57 S. W. 635 ..... 13, 19, 21

Fidelity Union Trust Co. v. Field, 311 U. S. 169 16

Griffin v. McCoach, 313 U. S. 498 6

Grovey v. Townsend, 295 U. S. 45 ..... 7, 16

Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 6

Layne-Western Co. v. Buchanan County, Mo., 85 Fed. (2d) 334 ..... 7, 17

Merrielles v. State Bank of Keokuk, 24 S. W. 564 23

Moore v. Illinois Cent. R. Co., 312 U. S. 630 ..... 7, 16

New England Mutual Life Ins. Co. v. Mitchell, 118 Fed. (2d) 414 ..... 7, 17

New York Life Ins. Co. v. English, 95 Tex. 391, 67 S. W. 884 19

Pendleton v. Great Southern Life Ins. Co., 273 Pac. 1007 27

Page

Ryan & Company v. M. K. T. Railway Co., 65 Tex. 13 23

Seiders v. Merchants Life Assn. of the U. S., 93 Tex. 194, 54 S. W. 753 19

Shoemaker v. American National Ins. Co., 30 S. W. (2d) 539; 48 S. W. (2d) 612 ..... 6, 8, 11, 18

St. Regis Candies, Inc. v. Hovas, 3 S. W. (2d) 429 . 12, 22

Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538 ..... 7, 16

Wade v. Travis County, Texas, 174 U. S. 499 ..... 7, 16

Walker v. Goetz, 218 S. W. 569 24

J. R. Watkins Co. v. McMullan, 6 S. W. 823 25

Yoder v. Nu-Enamel Corp., 117 Fed. (2d) 488 .... 7, 17

Judicial Code, Sec. 240(a) [28 U. S. C. A. 347(a)] .. 5, 10

Restatement of the Law of Conflicts of Laws, Sec. 322 19

Revised Civil Statutes of Texas, 1925, Art. 5048 . 6, 10, 14

Stromberg Conflict of Laws, page 214 25

Texas Law Review, 163 (Vol. 10) 21

University of Chicago Law Review, Vol. 9, p. 141 .. 26

Supreme Court of the United States

OCTOBER TERM, 1941

No......

JOHN D. MCCOACH, TRUSTEE,

Petitioner,

v.

J. ROB GRIFFIN, Administrator of the Estate of Robert D. Gordon, Deceased.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

YOUR PETITIONER respectfully submits his petition for a writ of certiorari directed to the record of the proceedings in the Circuit Court of Appeals for the Fifth Circuit, to bring such record here for revision and review of the decision of that court in the above entitled matter.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was brought in the United States District Court for the Northern District of Texas by Mrs. Fannie

V. Gordon, individually, and as next friend of her two minor children, against The Prudential Insurance Company of America, seeking to recover upon a policy of life insurance issued on the life of Robert D. Gordon. (R. 1.)

The insurance company answered by a Bill of Interpleader, which was allowed. The Bill of Interpleader named as cross defendants John D. McCoach, Trustee, John D. McCoach, Max I. Brenwasser, George B. Cody, Nathan Schweiger, Alfred D. Leonard, Frederick W. Mead, and Julius A. Bates. These parties answered, asking that the proceeds be awarded John D. McCoach, Trustee, who was named beneficiary in the policy. (R. 1, 2.)

Subsequently J. Rob Griffin was appointed administrator with will annexed of the estate of Robert D. Gordon, and was substituted in the cause as plaintiff. (R. 2.)

John D. McCoach, Trustee, and the other cross defendants were citizens of the State of New York; the plaintiff and the decedent were citizens of the State of Texas.

Gordon had dealings in New York with the cross defendants who formed the Middletown-Tex Oil Syndicate for the purpose of dealing with Gordon. (R. 2.) The Middletown-Tex Oil Syndicate was a common law association composed of McCoach and the other cross defendants. (R. 2.) Gordon procured a life insurance policy, payable to the association. (R. 2.) Some two years later this association ceased to do business due to financial reverses, and the seven members of that association formed a new association called the "Protection Syndicate." (R. 2.) McCoach was the Trustee of that association. The insurance policy was changed by Gordon to designate the Protection Syndicate and its indi-

vidual members as beneficiaries in place of the Middletown-Tex Oil Syndicate. (R. 3.)

The original policy was a term policy with the privilege of conversion into an ordinary life policy at the expiration of seven years. At that time Gordon converted the term policy into a new policy, with the individual members of the Protection Syndicate as beneficiaries. (R. 3.)

From the inception of Gordon's relations with the cross defendants he had borrowed money from them, and they had invested money in his oil enterprises in the State of Texas. (R. 3.) The policy of insurance was procured by Gordon to protect the loans and the investments these individuals and the association they comprised had made. (R. 17.) The premiums were paid by the association at Gordon's request upon his agreement to repay. However, neither the premiums nor any other loans or advancements were ever repaid by Gordon. (R. 2, 3.)

The loans and advancements made to Gordon exceeded the amount of the insurance policy. (R. 18.)

In 1934 Gordon agreed to relinquish his right to change the beneficiary and to receive disability payments and all other rights under the policy to the individual beneficiaries upon the association's agreement to pay to Gordon one-eighth of the proceeds of the policy received during his life time, and one-eighth of the proceeds of the policy to his wife at his death. (R. 4.) In surrendering these rights the last change of beneficiary was made, naming John D. McCoach, Trustee, as beneficiary. The naming of one individual rather than all was made at the suggestion of the insurance company, and McCoach was Trustee for the benefit of the former beneficiaries. (R. 5, 6.)

Subsequently three of the original members of the association assigned their interest in the policy. Two of these assignments were made for cash considerations, and the third was made by Alfred D. Leonard to his son, Leroy E. Leonard. There was no monetary consideration for the assignment from the elder to the younger Leonard, but it was made because the elder Leonard was unable to continue to pay his share of the premiums on the policy. (R. 6.)

None of assignees knew Gordon, never made any loans or advancements to him and never had any business dealings with him except to pay part of the premiums of the policy. None of the assignees were related to Gordon by blood or marriage. (R. 7.) The assignors admittedly had an insurable interest. (R. 7.)

In the District Court the insurance company was discharged with its fees and costs, and the controversy over the funds was decided in favor of McCoach, Trustee. (R. 1, 19.) An appeal was taken limited to the amount that would go to the assignees. (R. 7.) The case was submitted on appeal to the Fifth Circuit Court of Appeals, and the judgment of the lower court in favor of McCoach, Trustee, was affirmed. A writ of certiorari was granted by this court, and on June 2, 1941 the cause was remanded for determination of the law of Texas, as applied to the circumstances of this case (313 U. S. 498.)

After reargument the Circuit Court on November 15, 1941 reversed the judgment of the lower court and the cause was remanded with directions to enter judgment in favor of J. Rob Griffin. (R. 25.) Motion for rehearing was filed on the 6th day of December, 1941, which motion was thereafter overruled by the Circuit Court of Appeals with-

out written opinion on the 30th day of December, 1941. (R. 25, 28.) The time for filing this application was extended until April 15, 1942 by an order of this court dated March 27, 1942. (R. 28.)

QUESTIONS PRESENTED

1. In determining the applicable state law under the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, are the lower courts bound by the latest pronouncement of the highest court of the state in which they sit, or can they rely upon pronouncement of such courts which have later been expressly overruled?

2. In determining the applicable state rules involving a conflict of laws question, can the lower courts ignore the local conflict of laws rule and apply the internal rule?

3. Where there is no express ruling by the state court of the state in which the Federal Court sits on the point involved, what rule governs the lower courts under the doctrine of *Erie Railroad Co. v. Tompkins?*

JURISDICTION

The jurisdiction of this court is invoked and believed to be sustained under *Section 240 (a) Judicial Code* [*28 U. S. C. A. 347 (a)*] as amended by Act of Congress of February 13, 1925.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(a) The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local statutes and decisions.

This involves an interpretation of *Article 5048, Revised Civil Statutes of Texas, 1925*, and the decision of the Texas Commission of Appeals (opinion adopted by the Supreme Court) in *Brammer v. Wilder*, 57 S. W. (2d) 571, wherein it was specifically held that the rule laid down in *Cheeves v. Anders* has been changed, *Cheeves v. Anders* being the case principally relied upon by the Circuit Court of Appeals.

Further this involves inquiry as to whether the case of *Cheeves v. Anders* and those following it have not been overruled by the decision of the Commission of Appeals of Texas (opinion adopted by the Supreme Court) in *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612.

(b) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Griffin v. McCoach*, 313 U. S. 498, and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487, which holds that Federal Courts in diversity of citizenship cases are governed by the conflict of laws rule of the courts of the state in which they sit, rather than by the internal rule where a conflict of laws question is presented.

(c) If petitioner be mistaken in the effect of the holding of the cases cited in (b), then the Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court, in that by failing to take into consideration and discuss the Texas conflict of laws rule, and applying without comment its internal rule, it has in effect held that in cases involving a conflict of laws question, that the Federal Courts may apply the internal rule of the state in which they sit rather than its conflict of laws rule, even though the two rules be different.

(d) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Wade v. Travis County, Texas*, 174 U. S. 499; *Grovey v. Townsend*, 295 U. S. 45; *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538; and *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, which hold that Federal Courts should apply the latest pronouncements of the highest state court even though such pronouncement is in conflict with or overrules earlier holdings.

(e) The decision of the Circuit Court establishes a rule in conflict with the rule on the same matter established by Circuit Courts for the Seventh and Eighth Circuits in *Alexander v. Missouri State Life Ins. Co.*, 68 F. (2d) 1; *Layne-Western Co. v. Buchanan County, Mo.*, 85 F. (2d) 334; and *Yoder v. Nu-Enamel Corporation*, 117 F. (2d) 488, which hold that where decisions of a state court are conflicting the most recent pronouncement must be accepted by the Federal Courts as declaring the law of the state.

(f) The decision of the Circuit Court is in conflict with the decision of Fourth Circuit in *New England Mutual Life Ins. Co. v. Mitchell*, 118 F. (2d) 414 (cert. denied) which holds that dicta in opinions of state courts is not binding on the Federal Courts in determining the applicable state law.

(g) The Circuit Court of Appeals has so far departed from the accepted and usual judicial course of procedure, as to call for the exercise of this court's power of supervision. Although the highest court of the State of Texas has held that insofar as conflict of laws cases are concerned, the public policy of the State of Texas is determined by legislative enactment only, the Circuit Court of Appeals has held that the public policy of the State of Texas results from both legislative and judicial enactment relying on two decisions neither of which are Texas cases.

(h) The Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, in that it has held that under the Texas law insurance policies are not subject to assignment to parties have no insurable interest in the life of the insured. This is in conflict with the holding of the highest court of the State of Texas in *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612.

(i) Likewise the Circuit Court of Appeals has erroneously held that the assignments were made to parties having no insurable interest, and there is no finding to sustain such a conclusion.

CONCLUSION

The decision of the Circuit Court of Appeals erroneously construes the legal effect of the agreed facts in this cause. It applies to these facts rules drawn from superseded decisions which have no application, and fails to follow the rules and principles of the decisions of this court.

WHEREFORE, premises considered, your petitioner respectfully prays that a writ of certiorari issue under the seal of this court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit in the above cause, and that the record be removed to this court, and that the decree of the lower court be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941

No......

JOHN D. MCCOACH, TRUSTEE,

Petitioner,

v.

J. ROB GRIFFIN, Administrator of the Estate of Robert D. Gordon, Deceased.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PRIOR OPINIONS OF COURTS

There was no opinion filed in the District Court. The first opinion of the Circuit Court of Appeals is reported in 116 Fed. (2d) 261. The second opinion of the Circuit Court of Appeals (R. 23) is reported in 123 Fed. (2d) 550. The motion for rehearing was overruled without opinion. (R. 28.) The opinion of the Circuit Court of Appeals was rendered on November 15, 1941 (R. 23); petition for rehearing was filed December 6, 1941, and overruled December 30, 1941. (R. 25, 28.) The time for filing the petition for a writ of certiorari was extended to April 15, 1942. (R. 28.)

GROUNDS FOR JURISDICTION

The jurisdiction of this court is invoked and believed to be sustained under *Section 240(a), Judicial Code* [*28 U. S. C. A., Section 347 (a)*] as amended by the Act of Congress of February 13, 1925.

STATEMENT OF THE CASE

A rather comprehensive statement of the case has been given in connection with the petition. In addition, the facts set out in the opinion of this court and the prior opinions of the Circuit Court of Appeals are substantially correct. Where the attention of the court is directed to a specific fact or to an inaccuracy in the opinion, reference to the record page will be made.

SPECIFICATIONS OF ERROR
(Presented in Motion for Rehearing R. 25-28)

I.

The Circuit Court of Appeals erred in holding, "It is against the public policy of the State of Texas to allow anyone who has no insurable interest to be the owner of a policy of insurance upon the life of a human being," in that, *Article 5048, Revised Civil Statutes of Texas of 1925* and *Brammer v. Wilder*, 57 S. W. (2d) 571-574 (Comm. App.), shows that this is not the Texas rule.

II.

The Circuit Court of Appeals erred in relying upon *Cheeves v. Anders* as establishing the Texas rule as to insurable interest because the highest court of the state has

ruled that Article 5048, Revised Civil Statutes of Texas of 1925, "has changed the rule of public policy announced in the *Cheeves case*, and put in force in this state an entirely different rule." [*Brammer v. Wilder*, 57 S W. (2d) 571, 574].

III.

The Circuit Court of Appeals erred in holding, "This appeal is limited to a controversy over a portion of the proceeds of a policy of insurance claimed by assignees having no insurable interest in the life of the insured, a citizen of Texas at the time of his death and for many years prior thereto," in that, the lower courts held that the parties had an insurable interest, and there is no finding that they did not have such an insurable interest under the laws of the State of Texas.

IV.

The Circuit Court of Appeals erred in holding, "Upon the assignment of an interest in the policy in question to assignees not having an insurable interest, the policy did not become invalid, but the interest so assigned became payable to the estate of the insured," because this is contrary to the holding of the courts of the State of Texas in *Shoemaker v. Harrington*, 30 S. W. (2d) 539; 48 S. W. (2d) 612.

V.

The Circuit Court of Appeals erred in holding, "The public policy of the state does not depend exclusively upon legislation, but may be the result of judicial construction and announcement," because this is contrary to the holdings of the courts of the State of Texas as to what constitutes the public policy of the State of Texas as shown by

American National Insurance Co. v. Coates, 246 S. W. 356, 358; *St. Regis Candies, Inc. v. Hovas*, 3 S. W. (2d) 429, 433, Para. 2-5; and *Cheney v. Coffey*, 113 S. W. (2d) 162, 165, Para. 4-6.

VI.

The Circuit Court of Appeals erred in not determining the Texas conflict of laws rules and applying them to the circumstances of this case.

VII.

The Circuit Court of Appeals has assumed that the Supreme Court of the United States directed it to reverse this case, and has not analyzed and applied the law of the State of Texas as directed by the Supreme Court.

VIII.

The Circuit Court of Appeals erred in that its opinion is not based on the applicable law of the State of Texas, but on a superseded Texas case and two cases decided in the Federal Courts.

IX.

The Circuit Court of Appeals erred in stating that the petitioner had no insurable interest.

X.

The Circuit Court of Appeals erred in holding that the public policy of Texas forbids anyone to be the owner of an insurance policy on the life of a human being unless he has an insurable interest in such life.

XI.

The Circuit Court of Appeals erred in holding that the Texas conflict of laws rule is the same as its internal law rule.

XII.

The Circuit Court of Appeals erred in not following the Texas conflict of laws rules on contracts challenged as being against public policy, as set forth in *Fidelity Mutual Life Assn. v. Harris*, 94 Tex. 25; 57 S. W. 635.

ARGUMENT

As we interpret the previous opinion of this court (313 U. S. 498), the Circuit Court of Appeals was directed upon further hearing to determine the law of the State of Texas in regard to three propositions: 1. Did the change in the insurance contract leave its governing law unaffected? 2. Would the laws of the State of New York be applied to a New York contract in a Texas court? 3. Would the courts of the State of Texas refuse to enforce the contract involved in this cause because of its public policy?

The Circuit Court of Appeals has attempted only to determine the answer to question number 3. For this reason we will discuss these questions in their inverse order, and will attempt to show that under the law of the State of Texas the following is true: A. Texas has no public policy which would prevent the petitioner under the facts of this case from recovering the proceeds of the insurance policy. B. That the Texas courts would not refuse enforcement to a foreign contract on the basis of any supposed internal public policy. C. The change in the beneficiary of the in-

surance contract did not affect the law governing the insurance contract.

POINT A

The opinion of the Circuit Court on the second hearing is predicated upon two factors: (1) That the public policy of the State of Texas forbids anyone who has no insurable interest in the life of a human being to be the owner of a policy of insurance upon that life; and (2) that the assignees herein had no insurable interest in the life of the insured.

For its basis of holding that the petitioner had no insurable interest in the life of the insured, it quotes from and relies upon principally the case of *Cheeves v. Anders, Administrator*, 87 Tex. 287, 28 S. W. 274. This was a case that was decided by the Supreme Court of Texas in 1894. In 1921 the Legislature of the State of Texas enacted what is now *Article 5048 of Vernon's Annotated Revised Civil Statutes of the State of Texas, Revision of 1925*, which reads as follows:

> "Any corporation, partnership, joint stock association or any trust estate doing business for profit, may be named beneficiary in any policy of insurance issued by a legal reserve life insurance company on the life of any officer or stockholder of said corporation, joint stock association or trust estate; or any partnership or member thereof may be the beneficiary in any policy of life insurance issued by a legal reserve life insurance company upon the life of any member of said partnership; or any religious, educational, eleemosynary, charitable or benevolent institution or undertaking may be named beneficiary in any policy of life insurance issued by any legal reserve life insurance company upon the life of any individual. The beneficiaries aforenamed shall have an insurable interest for

the full face of the policy and shall be entitled to collect same. On all policies of life insurance heretofore issued by legal reserve companies in which any of the aforenamed shall have been designated beneficiaries in the policy, said beneficiaries shall have an insurable interest to the full extent of the face of the policy, and be entitled to collect same."

In 1933 the Supreme Court of Texas reviewed its prior rule in *Cheeves v. Anders* in connection with Article 5048:

> "When we come to examine Article 5048, which became a law long after the rendition of the opinion in Cheeves v. Anders, it is evident from its clear and unambiguous language that it has changed the rule of public policy announced in the Cheeves Case, and put in force in this state an entirely different rule. It is well settled that the Legislature has the power by legislative enactment, to declare the public policy of this state. American National Ins. Co. v. Coates, 112 Tex. 267, 246 S. W. 356 (Tex. Comm. App., opinion approved) * * *
>
> "Language could not more plainly express the legislative intent to, by statute, change the rule in Cheeves v. Anders and make the policy issued under the statute payable in full to the beneficiaries authorized therein without limitation as to debts." [*Brammer v. Wilder*, 57 S. W. (2d) 571, 574, 575.]

Thus, since 1921 *Cheeves v. Anders* has no longer been the rule in the State of Texas. The policy in question was issued in 1922, and the change of beneficiary complained of occurred in 1934.

Thus, the Circuit Court has refused to recognize the right of the Supreme Court of Texas to overrule its prior opinions, and has disregarded this subsequent announcement in favor of the earlier case without even a discussion of this last opinion.

The express purpose of the *Erie case* was to secure uniformity between the state and federal courts of a state. The law grows and gains statute only by enactments and judicial decisions dealing with new subject matter or modifying, repealing or construing old rules of law. The Legislature of Texas saw fit to destroy the almost unique archaeic rule of *Cheeves v. Anders* and the courts of the state have noted and acquiesced in that change. The Federal Courts are required to notice and follow this exposition of the law of the State of Texas and cannot continue to apply a rule that has been abandoned by state courts. *Wade v. Travis County, Texas*, 174 U. S. 499; *Grovey v. Townsend*, 295 U. S. 45, 52; *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543; *Moore v. Illinois Cent. R. Co.*, 312 U. S. 630, 634.

Regardless of what the circuit court might think of the meaning of Article 5048 it is bound by the Texas courts interpretation of the meaning scope of it. As said in *Fidelity Union Trust Co. v. Field*, 311 U. S. 169, 178:

> "Here, the question was as to the construction and effect of a state statute. The Federal Court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the state interprets and applies its legislation."

The other two Texas cases cited by the Circuit Court are based upon that portion of the opinion in *Cheeves v. Anders*, announcing the rule of public policy which was held to be overturned and repealed by Article 5084. Since the decision in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, the Circuit Court could not rely upon the two Federal cases cited by it.

Insofar as the other Texas cases are concerned the statements contained therein that might be applicable to the instant case are pure dicta. The Federal Courts cannot rely on dicta and chance remarks in determining the state rule but must look to the broad preview of the statutory common law of the state. *New England Mut. Life Ins. Co. v. Mitchell*, 118 Fed. (2d) 414, 420, Par. 11, 12 (cert. denied). At best these decisions conflict with the *Brammer case*. If this is so then, as the decisions are contradictory, the most recent pronouncement of the state court must be accepted as declaring the law of the state. *Yoder v. Nu-Enamel Corporation*, 117 Fed. (2d) 488, 490, Par. 4; *Layne-Western Co. v. Buchanan County, Mo.*, 85 Fed. (2d) 343, 348, Par. 10, 11 and *Alexander v. Missouri State Life Ins. Co.*, 68 Fed. (2d) 1, 3, Par. 1, 2.

The Circuit Court has assumed that the assignees had no insurable interest. We point out that the assignees were not a party to the cause before the Circuit Court, but that the party concerned was the named beneficiary, John D. McCoach, Trustee, and that there is no finding either by the District Court or the Circuit Court that the assignees had no insurable interest.

The trial court found "as a conclusion of law, I find that under the law of the State of New York neither an insurable interest, as we understand it, nor the relation of debtor and creditor, is necessary, but that even if it were necessary, those relations existed." (R. 24.)

It was found that the assignees had not paid any money to Gordon, nor were they interested with him in any investment of business, except the payment of premiums, that the assignees were not related to Gordon by blood or mar-

riage. (R. 25-29.) But this is not a finding that there was no insurable interest in the assignees. The petitioner should not be divested of the large sum of money involved in this controversy without a finding that the assignees have no insurable interest.

The Circuit Court relies upon the assignments to divest this petitioner of his rights for it is admitted that the assignors had an insurable interest in the life of the insured. (R. 7.)

Regardless of what the law may have been in the past, it has been since 1932, that there is no necessity for an assignee of an insurance policy to have an insurable interest at the time the policy matured. Although *Shoemaker v. American Nat. Ins. Co.*, 48 S. W. (2d) 612, discusses surrender value of the policy, the facts show that the policy had not matured, and that the right that was transferred was the right to collect the policy at maturity:

> "The insured may assign it (the insurance policy) for a valuable consideration, and pass title thereto, and confer upon the assignee the right to collect the debt at its maturity, *although such assignee has no insurable interest at the time the debt matures.*" [Interpolation ours) P. 614 (Para. 2).]

Thus the Circuit Court was in error in holding that upon the assignment being made that "the interest so assigned became payable to the estate of the insured," because it was in effect a void assignment.

POINT B

Even if it could be assumed that *Cheeves v. Anders* and the cases which follow it establish a rule of public policy which is still existent under the facts covered by such cases,

they would have no application to this proceeding, for all of them apply solely to contracts made within the State of Texas, and dealing with Texas parties. In this case it is admitted that the insurance contract is a New York contract.

As a general rule, a contract is governed by the law of the place where made, and the law of the place where made determines all questions in regard to the capacity to contract, the illegality of the contract, etc. *(Restatement of the law of Conflicts of Law, Section 322, Section 347)*, and the forum applies the law of the state where the contract is made. This is the Texas rule. *Fidelity Mutual Life Assn. v. Harris*, 57 S. W. 635, 94 Tex. 25.

This is also the Texas rule in regard to insurance contracts. In *American National Ins. Co. v. Smith* (writ of error refused), 13 S. W. (2d) 720, the law of the Republic of Mexico was applied in Texas in connection with insurance policies. In *Seiders v. Merchants Life Assn. of the United States* (Supreme Court of Texas), 93 Tex. 194, 54 S. W. 753, the court applied the law of the State of Missouri when it found that the insurance contract involved was a Missouri contract regardless of the fact that the insured and beneficiary both resided in Austin, Texas, and the company had a permit and was doing business in the State of Texas. It was conceded that the contract of insurance was made in Texas, but because the policy was payable in Missouri and the premiums were likewise payable there, the court applied the Missouri law. In *New York Life Ins. Co. v. English* (Supreme Court of Texas), 95 Tex. 391, 67 S. W. 884, the court applied the statutory law of the State of New York when it found that the policy was a

New York contract, even though the policy was issued on the life of a citizen of the State of Texas, and *even though the policy would have been void under the laws of the State of Texas.*

The case of *Chicago, R. I. & P. Railway Company v. Thompson* (Supreme Court of Texas), 100 Tex. 185, 97 S. W. 459, is a clear exposition by the Supreme Court of the State of Texas on applying laws of the State of Texas to contracts made in other jurisdictions. There a contract of employment was made in Oklahoma which contained a provision that the employee would within 30 days after receiving any injury give notice in writing of such claim as he might have. The Texas Legislature had set up as the public policy a minimum of 90 days in which any claim for damages could be required to be made and making requirements of a shorter time void. The court found that the contract of employment was an Oklahoma contract and then stated (page 460):

> "It is too well settled to require citation of authority that the statutes of a state (meaning Texas) have no extra-territorial operation, and cannot invalidate contracts made and to be performed in other jurisdiction. (Interpolation ours.)
>
> * * * * *
>
> "His right of recovery must be given by the law of the place where his injury occurred, whether that law be ascertained by a proof, or by presumption in the absence of proof.
>
> * * * * *
>
> "But this contention, at last, only goes to the legal effect of the stipulation upon plaintiff's right, and that is to be determined by the law for which the right must be derived—that of Oklahoma."

Thus, it is apparent that here, as this was a New York contract, the Texas courts, by virtue of their conflict of laws rule would apply to the contract the laws of the State of New York.

Although the contract involved was a foreign contract and the case calls for a decision upon the basis of the Texas conflict of laws rule, the Circuit Court nor the respondent has never cited a single case where the State of Texas has refused to uphold the validity of a foreign contract because of its public policy. As far as we can determine there is no such case. There is no case which discusses the exact point involved in this case, that is, an insurance contract where the parties reside outside of the State of Texas and the contract is admittedly a foreign contract.

The general rule in connection with the Texas conflict of laws rule is found in *10 Texas Law Review 163.* The writer discusses (page 182) the reaction of the courts of the State of Texas to the appeal to "local" or "public" policy to deny enforcement of foreign contracts, and says:

> "The Supreme Court's decisions have been singularly free from appeal to local policy as a reason for denial here of effect to foreign contracts. Where effect has been denied, it has ordinarily been because it was thought that our statutory law forbade enforcement even though the contract was foreign."

Probably the leading case relating to Texas conflict of laws rule as it pertains to contracts is *Fidelity Mutual Life Association v. Harris* (Supreme Court of Texas), 57 S. W. 635, 94 Tex. 25. There it is said:

> "It is true, however, that the effect of a contract, wherever it may come in question, is to be determined by the law with reference to which the parties con-

tracted, though it be that of another state of country, unless there is something in the law or policy of the form which forbids the application of the foreign law (638).

* * * * *

"As before noted, a court of one state will not apply to contracts brought before it the laws of another state, when such application is forbidden by the law to which the court owes obedience. In the cases referred to the transactions were so conducted as to be *controlled by statutes* in force in the states where the courts passing upon them sat. * * * *There is no statute in Texas which prevents the court from applying the general rule of comity stated at the outset.*" (Emphasis ours.)

In *American National Insurance Company v. Coates*, 246 S. W. 356 (Commission of Appeals), the highest court of the State of Texas rejected the judicial establishment of public policy stating:

"Each state in the Union has the power, by constitutional or statutory enactments, to declare its own public policy."

All references in Texas cases to judicially declared public policy relates to interpretation of the public policy as established by the constitution of legislative enactment:

"When the law makers speak upon a subject over which they have constitutional jurisdiction, their words define the 'public policy' of the subject." *St. Regis Candies, Inc. v. Hovas* (Commission of Appeals), 3 S. W. (2d) 429, 433, Pars. 2 to 5.

See *Chaney v. Coffey* (Commission of Appeals), 113 S. W. (2d) 162, 165, Pars. 4 to 6.

There is no statute which would govern the instant situation. The Texas courts will enforce a foreign contract unless there is something in its own statutory law that would

prevent the enforcing of such contract, even though it might not enforce such contract where only a Texas contract and Texas parties were concerned. In the case at bar that the Texas Courts would enforce the New York contract. The United States courts are bound by the Texas rule as to what constitutes public policy in passing on foreign contracts.

The courts of the State of Texas have given clear evidence of what they do when the question of public policy is raised. In the case of *Ryan & Co. v. M-K-T Ry. Co.* (Sup. Court), 65 Tex 13, a contract of carriage had been made in Missouri by a resident of Texas. The goods were to be transported from Missouri to Texas. In the contract was a stipulation that the carrier was exempt from liability for loss or damage to the goods by destruction by fire. The State of Texas had a statute which forbade a common carrier from placing in its bill of lading stipulations restricting its liability and declaring such stipulations null and void. The court found that the contract of carriage was a Missouri contract even though it would have to be partially performed in Texas and applied the Missouri law disregarding the Texas public policy.

The State of Texas has numerous statutory enactments protecting the property of married women. In *Merrielles v. State Bank of Keokuk*, 24 S. W. 564, an attachment lien had been foreclosed upon the separate property of a married woman in violation of the Texas statute. In disposing of the case on appeal the court said (page 565, Par. 4):

> "Appellant, in her fourth assignment, complains that 'the court erred in submitting to the jury the laws of Iowa to create a liability against the separate real estate of a married woman situated in Texas, *contrary to the constitution, laws and public policy of Texas,*

and in overruling the motion for a new trial based on this ground.' Without undertaking an extended discussion of this question, we express the conclusion that the court correctly applied the law of Iowa—the 'lex loci contractus'—in the enforcement of the obligations in suit. This action, we think, was justified by the views of our Supreme Court in Ryan v. Railway Co., 65 Tex. 13 et seq." (Emphasis ours.)

Under similar circumstances (the parties living in Arizona) the laws of the State of Arizona were applied and execution allowed to be had upon the separate property of a married woman located in two Texas counties *(Walker v. Goetz*, 218 S. W. 569), contrary to the internal public policy rule. In *Automobile Mortgage Company v. Ayub*, 266 S. W. 134, public policy as a basis for refusing to enforce foreign contracts was rejected by the Supreme Court of the state. The Court of Civil Appeals had announced as a basis for its holding:

"In view of the fact that the notes originated in a transaction, which in effect in substance constituted a sale of intoxicating liquor, that such sale in part was the consideration for the notes, that the contract of purchase was made in El Paso, and the notes executed and made payable there, we are of the opinion that the validity of the notes is to be governed by the laws of this country, and recovery denied, because *they are based upon and arise out of a transaction which contravenes our public policy.*" (Emphasis ours.)

This contention was rejected with the statement (page 134):

"We are not prepared to give approval to the proposition that, even if this had been a sale of an interest in a stock of intoxicating liquors, situated in the Republic of Mexico, the contract of sale being consummated in this state, such would be in contravention of public policy and void."

All material facts and holdings appear in the following quotation from *J. R. Watkins Co. v. McMullan*, 6 S. W. (2d) 823-824:

> "But appellant's contention is fully set out in its proposition, as follows: 'A petition seeking recovery on a contract alleged to have been made in a state other than Texas, valid under the laws of the state where made, and to be performed outside of Texas, shows a good cause of action, enforceable in Texas, and not subject to demurrer on the theory that such contract is in violation of the anti-trust laws of Texas.'
>
> "It is immaterial, we think, that the contract sued upon was valid in Minnesota. It was performable in Oklahoma, and the general rule is that, unless a contrary intention of the parties appears, the validity of a contract is determined by the laws of the state where it is to be performed, and not by those of the state in which it was entered into. Fidelity Mutual Life Association v. Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. R. 813; Hall v. Cordell, 142 U. S. 116; 12 S. Ct. 154; 35 Law Ed. 956; 12 C. J. 450; 5 R. C. L. Sec. 26, p. 936. Thus the validity of the contract in question is to be tested by the laws of Oklahoma and not those of Minnesota."

The Circuit Court ignored the fact that the State of Texas would apply the law of the State of New York to the insurance contract involved herein, and that regardless of what the internal rule might be, as this was a conflict of law situation, the Texas courts would uphold the validity of the contract. The decisions of the Texas courts take a liberal view in regard to contracts made outside of the state and uphold their validity if possible. The Texas courts do not presume that men will do a foolish thing and their acts will be upheld if at all possible. *Stumberg Conflict of Laws*, page 214, note 60; *Dugan v. Lewis* (Supreme Court of Texas), 14 S. W. 1024, 79 Tex. 246.

In passing we wish to call to the court's attention the effect of the decision of the Circuit Court. This is succinctly stated in *9 University of Chicago Law Review, 141, 145:*

> "Apparently, while a state court may constitutionally refuse to enforce a cause of action derived from foreign law, *it may not thereby destroy the cause of action in the courts of another state.* If this is a correct statement of the law, then the most the state courts in Texas could constitutionally have done would have been to refuse to enforce the assignees' cause of action. Or if the assignees had been defendants relying on a defense valid under foreign law, but regarded by the Texas state court as contrary to its public policy, the court would have had either to dismiss the action or to recognize the foreign law. The assignees would still have had a cause of action in another state. If the state courts of Texas could not constitutionally deprive the assignees of their cause of action in another state, it may well be questioned whether an application of the interpleader act reaching this result in a Federal Court (applying state law) is constitutional."

This article is discussing the instant case. It is apparent that to refuse the enforced right in this cause on the basis of public policy is not merely to force the owner of those rights to go elsewhere to enforce them, but to deprive them of their legal rights. That has never before been considered a proper act on the part of any court.

POINT C

So far as we have been able to determine, there has not been a Texas case passing upon the question as to whether a mere change of beneficiary in a state different from that of the policy constitutes a new contract, or merely an amendment of the old. As far as we have been able to discover, there has only been one case in which this question

has been passed upon, and that was *Pendleton v. Great Southern Life Ins. Co.* (Supreme Court of Oklahoma), 273 Pac. 1007. That court held (page 1009):

> "This constituted the policy an Oklahoma contract and the same is thereby construed according to the laws of Oklahoma. *The fact that the beneficiary was changed does not constitute a new contract, and the act of changing the beneficiary is only the carrying out of one of the provisions of the contract.* The Oklahoma National Life Insurance Company agreed to pay the amount of the policy to the beneficiary named in the policy, or to such other beneficiary as the insured would thereafter name and designate in the manner provided by the policy. The changing of the beneficiary at Houston, Texas, is nothing more than the performance of one of the things that the Oklahoma National Life Insurance Company, in its policy, agreed to do upon request." (Emphasis ours.)

To the same effect see *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 399-400.

The courts of the State of Texas in the absence of prior authority in their own jurisdiction look to their sister states. It can only be presumed that Texas would follow the rule as enunciated by the Supreme Court of Oklahoma. Thus it would be held by the courts of the State of Texas that the changes made in the insurance contract left its governing laws unaffected.

CONCLUSION

We submit that the Texas courts would hold that the changes made in the insurance contract left its governing laws unaffected; that the laws of the State of Texas would not be applied to the foreign contract, but that the rules of the foreign state would be respected; and that the courts

of the State of Texas would not refuse enforcement of the contract on the basis of a public policy which it did not have.

Under the circumstances we submit that this case calls for the exercise by this court of its supervisory power by granting a writ of certiorari and reversing the decision of the Circuit Court of Appeals.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 1144

JOHN D. MCCOACH, *Trustee*,
Petitioner,

v.

J. ROB GRIFFIN, Administrator of the Estate of Robert D. Gordon, Deceased.

PLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Summary Statements of Facts	2
Questions Presented and Their Answers	2– 6
Conclusion	6– 7

Page

Article 5048 of Vernon's Annotated Revised Civil Statutes of the State of Texas 3

Brammer v. Wilder, 57 S. W. (2d) 571 ..... 3, 4

Cheeves v. Anders, etc., 87 Texas 287, 28 S. W. 274 ..... 2, 3, 4, 5

Shoemaker v. American National Ins. Co., 48 S. W. (2d) 612 ..... 3, 4, 5

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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorables the Chief Justice and the Associate Justices of the Supreme Court of the United States:

THE RESPONDENTS herewith respectfully submit their reply to the petitioner's petition for writ of certiorari:

In this brief we will direct our reply solely to the first point raised by the petition because, while the previous arguments before this Honorable Court and the Honorable Circuit Court of Appeals were directed to the other points raised by the petitioner, the first point was not raised until the motion for re-hearing, after the second decision of the Circuit Court of Appeals in this cause. The other points, however, were fully argued before each court and were directly covered in the Circuit Court of Appeals' opinion following the opinion of this Honorable Court.

Summary Statement of Facts

The statement of facts in the petitioner's application is correct in so far as it goes, but it omits certain pertinent facts; for instance, while the original beneficiaries made loans to the deceased, Gordon, the petitioner goes on to say that some of these original beneficiaries assigned their interest to three separate assignees and this cause involves only the interest of these three assignees. Then the petitioner continues by saying (Page 4) that "None of the assignees knew Gordon, never made any loans or advancements to him and never had any business dealings with him, except to pay part of the premium of the policy. None of these assignees were related to Gordon by blood or marriage."

What the petitioner omits to state is that none of these assignees were stockholders, shareholders, interest holders or officers, or in any way connected with a corporation, joint stock company or trust estate which was "*doing business for profit.*"

Furthermore, the petitioner fails to state that at all times involved in the instant cause the deceased, Robert D. Gordon, was a citizen of the State of Texas.

Questions Presented and Their Answers

As stated in the caption of this brief, the only reply which we consider it necessary to make to the petition involves a reply to the first point raised by the petitioner, in which it is claimed that the Circuit Court of Appeals has followed the pronouncement of the Supreme Court of Texas in the case of *Cheeves v. Anders, etc.*, 87 Texas 287, 28 S. W. 274, whereas it is claimed by the petitioner that the rule an-

nounced in that case has been changed by statute and overruled by later decisions principally in *Brammer v. Wilder*, 57 S. W. (2d) 571 and *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612.

This, the respondent emphatically denies. But, because the argument now made by the petitioner was not made in the first appeal to the Circuit Court of Appeals and was not presented to this Honorable Court at the time certiorari was previously granted and this case reversed and remanded to the Circuit Court of Appeals, nor was it made in the briefs or arguments before the Circuit Court of Appeals in the second argument and, therefore, was not covered in the opinion of that court, we feel it necessary to reply to the petition for writ of certiorari on this one point only.

It is true that the case of *Cheeves v. Anders supra* was decided in 1894 and it is further true that in 1921 the legislature of Texas enacted what is now Article 5048 of *Vernon's Annotated Revised Civil Statutes of the State of Texas* and it is true that section of the Texas statutes changed the rule of *Cheeves v. Anders*, but it is an elementary rule of construction that that statute changed the previous rule only in the respect covered by the statute. And there is no contention here that any of the prerequisite facts set out in the statute apply to the instant case.

The assignees of the original beneficiaries in this case are not members of "any corporation, partnership or joint stock association, or trust estate, *doing business for profit*." The beneficiaries at the time of Gordon's death were members of only one organization, the "Protection Syndicate," and as shown by its articles of association, set out on Page

9 of the Record, their only business was to pay the premiums on the policy. That does not constitute "doing business for profit."

Brammer v. Wilder, 57 S. W. (2d) 571 was a case in which the facts were covered by the statute and it clearly decided that the rule of public policy announced in the *Cheeves case* had been changed, but it also correctly decided that it had been changed only in the respect covered by the statute.

The other Texas case referred to in the argument is *Shoemaker v. American National Ins. Co.*, 48 S. W. (2d) 612 and in that connection the petitioner quotes from the opinion and makes a very glaring error. The quotation in the petitioner's brief on Page 18 is as follows:

> " 'The insured may assign it (the insurance policy) for a valuable consideration, and pass title thereto, and confer upon the assignee the right to collect the debt at its maturity, *although such assignee has no insurable interest at the time the debt matures.*' (Interpolation ours.) P. 614 (Para. 2.)"

It will be noticed that after the word "it" the petitioner interpolates his own words "(the insurance policy)" thereby leading this court to believe that an insurance policy may be assigned, in Texas. The opinion shows, however, that the "it" referred to in the language quoted is not the insurance policy but the *cash surrender value* of the insurance policy. The petitioner has taken only a portion of a sentence in the opinion. But a reading of the whole sentence shows beyond the peradventure of a doubt what the court intended. The entire meaning, the entire opinion, even the entire holding of the court would be the opposite if the interpolation were correct, but it is not correct. Not only is

this interpolation completely wrong but the conclusion which the petitioner attempts to convey is contrary to the express holding in the very *Shoemaker case* from which the partial quotation is taken.

Furthermore, the petitioner cites this case as authority for his statement that the rule as announced by the Supreme Court of Texas in *Cheeves v. Anders* has been overruled. This may be the petitioner's view but it is not the court's view because, in the first paragraph of the opinion proper, after the statement of facts, the court refers to the case of *Cheeves v. Anders*, and the cases which followed that rule, and specifically stated "if the facts in the case at bar made applicable the principles of law announced in those cases it would have followed them."

Instead of being an authority reversing the principle announced in *Cheeves v. Anders* this *Shoemaker case* is an authority sustaining that case because, in the body of the opinion, the court stated that if the case involved an assignment of an insurance policy then "so much of said contract as related to said insurance policy would be in violation of the public policy of the State and illegal."

Lastly, under this same argument, the petitioner states that the Circuit Court has assumed that the assignees who are involved in this appeal had no insurable interest and, here again, he quotes, as he did in his motion for rehearing before the Circuit Court, a quotation from the conclusions of law, of the District Judge as shown on Page 24 of the record.

We wish to call the court's attention to the fact that the quotation contained in the brief of the petitioner is from language used by the District Judge in referring to the

original beneficiaries *and not to the assignees.* It is impossible to conceive how such a mistake could have been made because immediately following the language quoted the record will show that the court below was asked to make findings concerning the assignees involved in this appeal, and made them.

The petitioner agreed to the record on appeal. That agreement stipulates that "none of the assignees knew Gordon, never made any loans or advancements to him, and never had any business dealings with him, except to pay part of the premiums of the policy. None of the assignees were related to Gordon by blood or marriage." (Record 7.) And yet, on Page 18 of the brief the petitioner contends that there was no finding of a lack of insurable interest in these same assignees. The language could not be clearer than the petitioner's own agreement and yet now it is contended that there is no finding of insurable interest. The statement of the matter, of course, answers the argument presented.

Conclusion

As we have stated before, we feel it unnecessary to answer the brief of the petitioner as to all of the other points referred to therein because they were adequately covered in the printed briefs and other oral arguments twice before the Circuit Court of Appeals and once before this Honorable Court. The foregoing matter was, however, brought before the Circuit Court only after the written opinion was filed for the second time. It was brought out in the motion for rehearing and, therefore, was not referred to in the written opinion. For that reason only we feel called upon

to direct at least the attention of the court to the errors in the statements which have been made.

Respectfully submitted,

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